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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EMMANUEL GOMEZ,

Defendant and Appellant.

G049890

(Super. Ct. No. 11CF1422)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Emmanuel Gomez was convicted of attempted premeditated murder and other crimes for attacking a rival gang member with a screwdriver. His sole contention on appeal is that the prosecutor committed prejudicial misconduct in closing argument by misstating the law on premeditation and deliberation. We disagree and affirm the judgment.

FACTS

In 2007, appellant and Brian Suarez were stabbed by members of a rival gang known as O.C.C. Turning the tables, appellant and Suarez confronted Sergio Romero and other members of O.C.C. on June 4, 2008. Romero's group was sitting under a tree that day when appellant, Suarez and Rosalia Salazar pulled up to them in a car and asked where they were from. When the people in Romero's group said O.C.C., appellant and Suarez exited their car and went on the attack. Appellant repeatedly stabbed Romero in the chest and back with a screwdriver, and Suarez struck a different victim with a hammer. The assailants fled the scene but were identified by witnesses and soon arrested.

Following a jury trial, appellant was convicted of attempted murder, aggravated assault and active participation in a criminal street gang. The jury also found true allegations appellant acted with premeditation and deliberation, inflicted great bodily injury and benefited his gang. The trial court sentenced appellant to prison for three years plus life with the possibility of parole after fifteen years.

DISCUSSION

Appellant contends the prosecutor's comments in closing argument regarding premeditation and deliberation were prejudicially misleading and lessened the state's burden of proof. We disagree.¹

¹ Although appellant forfeited this claim by failing to raise it in the trial court (*People v. Samayoa* (1997) 15 Cal.4th 795, 841), we will consider it because he contends his attorney was ineffective for failing to do so. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82.)

In discussing the attempted murder count in closing argument, the prosecutor told the jury “[t]he length of time the person spends considering whether to kill does not alone determine whether the attempted killing is done deliberate[ly] and [with] premeditat[ion]. A decision to kill made rashly, impulsively or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly.” These comments parroted the trial court’s instructions to the jury and are not challenged on appeal. (See CALCRIM No. 601.)

However, appellant does challenge what the prosecutor said next. He told the jurors, “*We make decisions all the time. It’s very easy to make decisions where you’re balancing tradeoffs. You know, the decision going to the movie, as opposed to going to dinner. The choice to spend money on that, as opposed to something else.* [¶] . . . [T]here is a process of deliberation. You don’t have to have someone write out notes that say that. But there’s more than enough time that occurs during this transaction which shows you there’s time to deliberate, and a balancing of the choice. Because they understand, both Mr. Suarez and Mr. Gomez, what will happen as a result of these actions.” (Italics added.)

Focusing on the italicized remarks, appellant contends the prosecutor trivialized the concept of premeditation and deliberation. He contends “a person deciding to go to a movie or dinner does not engage in the type of deliberation and reflection on the moral, ethical and pragmatic considerations involved in deciding whether to commit homicide.”

That may be true. Or – sadly – it may not. Either way, in using the movie example to help explain premeditation and deliberation the prosecutor was simply trying to make the point that, while those concepts do require careful consideration, they do not require a lengthy and involved thought process. Indeed, as the trial court’s instructions made clear, and our Supreme Court has repeatedly stated, premeditation and deliberation

can occur in a very short period of time. (CALCRIM No. 601 [“The test is the extent of the reflection, not the length of time”]; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294 [premeditation and deliberation “can occur in a brief interval”]; *People v. Cook* (2006) 39 Cal.4th 566, 603 [premeditation and deliberation merely require “an opportunity for reflection”].) So the prosecutor’s remarks were not misleading or inaccurate. (See *People v. Osband* (1996) 13 Cal.4th 622, 697 [prosecutor did not misstate the law by arguing premeditation simply means “considered beforehand”].)

Nor did they effectively lower the prosecution’s burden of proof. In arguing otherwise, appellant relies on *People v. Johnson* (2004) 119 Cal.App.4th 976, *People v. Johnson* (2004) 115 Cal.App.4th 1169 and *People v. Nguyen* (1995) 40 Cal.App.4th 28, but those case are inapt because they involved prosecutorial comments on the reasonable doubt standard, not the elements of premeditation and deliberation. Here, in contrast, there was nothing in the prosecutor’s argument that even remotely suggested he did not have to prove the premeditation and deliberation allegation beyond a reasonable doubt. That being the case, we fail to see how the argument could possibly have led the jury to apply an incorrect standard of proof in assessing the truth of that charge.

Assuming arguendo the prosecutor’s remarks were somehow misleading, appellant could not have been prejudiced by them because the jurors were properly instructed on the prosecution’s burden of proof and the definition of premeditation and deliberation, and they were told they must follow the court’s instructions if they conflicted with anything the attorneys said in closing argument. In light of these instructions, it is not reasonably likely the challenged remarks actually misled the jury or tainted its verdict. There is no basis for reversal. (*People v. Morales* (2001) 25 Cal.4th 34, 47.)

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.